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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 368

ANGELIKA L. SCHNEIDER, *Appellant*,

v.

DEAN RUSK, individually, and as Secretary of State,
Appellee.

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

OPINION BELOW

The majority opinion of the three-judge District Court and the dissenting opinion of Circuit Judge Fahy was entered on May 21, 1963 (R. 32) and are reported at 218 F. Supp. 302.

JURISDICTION

On June 7, 1963 a three-judge District Court, one judge dissenting, entered a judgment (R. 67) granting appellee's motion for judgment on the plead-

ings, denying appellant's motion for a summary judgment of injunction, and dismissing the action. A notice of appeal was filed in the District Court on June 27, 1963 (R. 68).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

This Court noted probable jurisdiction on October 28, 1963 (R. 70).

QUESTIONS PRESENTED

1. Whether Section 352(a)(1) of the Immigration and Nationality Act of 1952, which provides that any naturalized citizen who resides for more than three years in his country of origin shall lose his American citizenship, has deprived appellant of her citizenship without due process of law, contrary to the Fifth Amendment, in that that section has subjected her to consequences not imposed upon native-born citizens, thereby discriminating against her solely on the grounds of her birth and national origin.

2. Whether Section 352(a)(1) is beyond the power of Congress to enact because it bears no reasonable relationship to any power granted to Congress.

3. Whether Section 352(a)(1) violates the Eighth Amendment in that it imposes cruel and unusual punishment upon the appellant.

4. Whether Section 352(a)(1) is unconstitutional because it imposes punishment or other sanctions without affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article 1, Section 8, Clause 4 of the Constitution provides

> "The Congress shall have Power . . . To establish an uniform Rule of Naturalization, ..."

The Fifth Amendment to the Constitution provides in pertinent part

> "No person shall . . . be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ., and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of counsel for his defense."

The Eighth Amendment to the Constitution provides in pertinent part:

> ". . . [N]or [shall] cruel and unusual punishments [be] inflicted."

Section 352 of the Immigration and Nationality Act of 1952, 66 Stat. 269, 8 U.S.C. § 1484, reads as follows:

> "Loss of nationality by naturalized national
>
> "(a) A person who has become a national by naturalization shall lose his nationality by—
>
> "(1) having a continuous residence for three years in the territory of a foreign state of which

he was formerly a national or in which the place of his birth is situated, except as provided in seciton 353 of this title, whether such residence commenced before or after the effective date of this Act;

"(2) having a continuous residence for five years in any other foreign state or states, except as provided in sections 353 and 354 of this title, whether such residence commenced before or after the effective date of this Act.

"(B) (1) For the purpose of paragraph (1) of subsection (a) of this section, the time during which the person had his residence abroad solely or principally for a reason or purpose within the scope of any provision of section 353 of this title shall not be counted in computing quantum of residence.

"(2) For the purpose of paragraph (2) of subsection (a) of this section, the time during which the person had his residence abroad solely or principally for a reason or purpose within the scope of any provision of section 353 and 354 of this title shall not be counted in computing quantum of residence."

Section 101 of the Immigration and Nationality Act of 1952, 66 Stat. 166, § 101(a)33, 8 U.S.C. § 101(a)33 reads as follows:

"The term 'residence' means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent. Residence shall be considered continuous for the purposes of sections 350 and 352 of this title where there is a continuity of stay but not necessarily an uninterrupted physical presence in a foreign state or states or outside the United States."

The text of other relevant provisions of the Immigration and Nationality Act of 1952, Sections 353, 354, and 356 are attached to this brief as an appendix.

STATEMENT OF THE CASE

Appellant was born on May 28, 1934, in Rimsting-am-Chiemsee, Bavaria, in what is now the Federal Republic of Germany. At birth she was a national of Germany. In April 1939, before she was five years of age, she was brought to this country by her family. On December 4, 1950, petitioner became a citizen of the United States by derivative naturalization, through the naturalization of her mother (R. 2, 9, 17, 34).

Appellant lived in the United States continuously from 1939 to 1954—from age five to age twenty. She was educated at grade school at Croton-on-Hudson, New York, in high school at Cornwall-on-Hudson, New York, and Flushing, Queens, New York, and at Smith College in Northampton, Massachusetts, where she was graduated in 1954 with the degree of Bachelor of Arts. Thereafter, she studied at the University of Bern in Switzerland from 1954 to 1955 on a scholarship given by the Institute of International Relations in New York, and in the following year was a full-time student at the Sorbonne in Paris. She returned to the United States in April 1956, took up residence in Nutley, New Jersey and was employed in New York City (R. 2, 9-10, 17, 34).

On June 6, 1956, appellant left the United States to marry Dr. Dieter Schneider, a German citizen and attorney-at-law practicing in Cologne, Germany, to whom appellant had become engaged while studying in Paris. Since that time, appellant lived continuously with her husband in the Federal Republic of

Germany, for a period of more than three years, except for one six-week family visit to the United States, in September and October of 1957 (R. 2, 10, 18, 34-35).

The two sons born to appellant, one in 1957 and the other in 1958 were, at the time of birth, and are now, citizens of the United States, duly registered as such at the United States Consulate (R. 3, 10, 19).*

During all the time of her residence in Germany until June 1959, appellant was in possession of a valid United States passport. In June 1959, however, the United States Consulate in Dusseldorf refused to grant appellant an extension of her passport contending that appellant had lost her United States citizenship. In September 1959, appellant was requested by the American Consulate to surrender her naturalization certificate which she did under protest. On November 25, 1959, appellant was served with a "Certificate of Loss of Nationality of the United States" (R. 2, 3, 10-11, 19-20, 35).

The Board of Review on the Loss of Nationality in the State Department in Washington affirmed by letter of January 20, 1960, the previous administrative decision that appellant had lost her citizenship pursuant to Section 352(a)(1) of the Immigration and Nationality Act of 1952. This action was, under the regulation, the "final administrative determination" of the State Department, leaving appellant without further administrative remedy. Pursuant to this ruling appellant is now being denied all rights and priv-

* There are two younger sons of appellant's born subsequent to the institution of these proceedings, whose existence is not reflected in the record, but whose citizenship depends on the outcome of this case.

ileges of United States citizenship, including a United States passport (R. 11-12, 21, 35).

Appellant is now residing in the Federal Republic of Germany. The authorities in Germany have given petitioner a temporary identification paper as a stateless person and a temporary resident permit which may be withdrawn at any time (R. 1-2, 4, 7, 8, 35).

Appellant feels herself to be an American. She feels no political connection with Germany or its Government and has no political loyalty or allegiance to that country. Although she could acquire Germany citizenship because of her marriage to a German citizen she has not done so. She desires both to continue to be an American citizen and to remain with her husband and children in Germany where her husband practices his profession (R. 4, 7-9, 12, 35).

THE HISTORY OF THESE PROCEEDINGS

On February 1, 1960, appellant filed a complaint in the District Court for the District of Columbia alleging that Section 352(a)(1) of the Immigration and Nationality Act of 1952, the provision pursuant to which she is deprived of her citizenship, is invalid under the Constitution of the United States. (R. 1) She sought an injunction against the enforcement of Section 352(a)(1), a declaration that she is a citizen of the United States, and certain other relief (R. 4-5).

On April 15, 1960, appellant applied for the convening of a three-judge District Court. This application was denied by the District Court on June 19, 1960 (R. 33-34).

On August 17, 1960, a single judge of the District Court entered an order denying appellant's motion for

summary judgment, granting appellee's motion for judgment on the pleadings, and dismissing the complaint. (R. 27)

The Court of Appeals, on May 11, 1962,[1] affirmed the judgment of the District Court (R. 28).

A writ of certiorari was granted by this Court on October 15, 1962, 371 U.S. 858. On February 18, 1963, before oral argument had been presented, this Court by *per curiam* opinion, vacated the judgments of the courts below and remanded the case to the District Court for trial before a three-judge court, on the ground that the constitutional questions presented were "not plainly insubstantial" and that the District Court erred in denying appellant's original application for the convening of a three-judge court (R. 29), 372 U.S. 224, 225.

A three-judge District Court was duly convened and a hearing was held on April 1, 1963. The judgment of that court was entered on June 7, 1963, Judge Fahy dissenting (R. 67). Notice of appeal was filed June 27, 1963 (R. 68).

This Court noted probable jurisdiction on October 28, 1963 (R. 70).

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[1] The time lapse between the judgments of the District Court and the Court of Appeals is accounted for as follows:

On March 24, 1961, after the case had been briefed and argued in the Court of Appeals, that court *sua sponte* postponed its decision pending this Court's decision in *Rusk* v. *Cort*, 369 U.S. 367. On April 25, 1961, the Court of Appeals denied a motion by appellant asking the court either to decide the matter promptly or certify it to this Court. On May 12, 1961, appellant petitioned this Court for a writ of certiorari before judgment. The writ was denied on June 19, 1961, 366 U.S. 963.

SUMMARY OF ARGUMENT

I

Section 352 arbitrarily discriminates against naturalized citizens in violation of the Fifth Amendment's guarantee of due process. The discriminatory and arbitrary denial of citizenship to one class of American violates the Fifth Amendment's prohibition against depriving any person of life, liberty or property without due process of law. *Bolling* v. *Sharpe*, 347 U.S. 497, 498.

A. The discrimination here attempts to take away the right of citizenship in the United States from a person loyal to the United States, and bearing it allegiance merely because she is living abroad with her husband—a fact not a ground for revocation of the citizenship of a native-born citizen.

B. The citizenship sought to be taken away was acquired in good faith and the events occasioning her marriage and residence abroad were not contemplated at the time of appellant's naturalization.

C. The discrimination could not be sustained even if it were shown to assist in some legitimate Congressional objective.

1. The discrimination creates a second-class citizenship contrary to the often reiterated equality of born and naturalized citizens under the Constitution. *Osborn* v. *The Bank of the United States*, 22 U.S. (9 Wheat.), 738, 827-828; *Luria* v. *United States*, 231 U.S. 9. It imposes on naturalized citizens because they are naturalized an obligation to reside in the United States and makes them subject to controls on residence and travel abroad which are not and could not be imposed on the native born. See *Kent* v. *Dulles*, 357 U.S. 116.

2. The discrimination imposed by Section 352 is of an invidious nature because it is based on the premise that naturalized citizens, *as a class*, are less loyal or more likely to abandon their allegiance to the United States than the native-born. Group legislation of this kind, particularly when based on such factors as national origin or foreign birth, is not permitted under the Constitution except in extreme emergency. See *Hirabayashi* v. *United States*, 320 U.S. 81, 100.

D. In any event the discrimination embodied in Section 352 may not be justified as a proper exercise of Congress' foreign affairs power. This is because the "means"—the withdrawal of citizenship of naturalized citizens on a discriminatory basis is not reasonably related to the "end"—the regulation of foreign affairs. *Perez* v. *Brownell*, 356 U.S. 44, 58. Nothing in the residence abroad of naturalized citizens has been shown to create any foreign affairs problem to justify the restrictions Congress has imposed broadly on all naturalized citizens.

1. The legislative history indicates that the statute was passed not to resolve any foreign affairs problems attending the residence abroad of naturalized citizens, but that the purpose of the statute was to strip of their citizenship naturalized citizens who reside abroad on the assumption that all such citizens have abandoned their allegiance to the United States. The statute was intended to eliminate the administrative or judicial difficulties of making a case by case determination of allegiance as was necessary under prior legislation. This is clearly arbitrary and the statute cannot be sustained on such grounds.

2. All possible difficulties said to attend the residence abroad of a few naturalized citizens have not been

shown to be incapable of resolution by less drastic legislation not broadly applicable to all naturalized citizens residing abroad. Legislation limited in its effect is clearly available to Congress, and Congress was required to use such alternate measures. See *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349. The measures Congress has adopted are clearly inappropriate to the difficulties to be dealt with. *Perez* v. *Brownell*, 356 U.S. at 60.

3. Even assuming the residence abroad of naturalized citizens may be more likely to give rise to foreign affairs problems than the residence abroad of native-born citizens, the difference in treatment which Congress has imposed is clearly out of all proportion to the possible problems which may be caused by such residence. The withdrawal of the precious right of citizenship from one citizen and not of another for the same act may not be based on such an uncertain and tenuous basis.

4. The present legislation cannot be sustained on the basis of the long resolved Nineteenth Century problems arising out of the difficulties in providing diplomatic protection to naturalized citizens. Nor did Congress legislate with this end in view.

5. There is no basis for the discrimination as a means to avoid the occurrence of dual nationality. This problem exists with respect to native-born, as well as naturalized citizens, who reside abroad. It has been and can be dealt with by more limited legislation.

II

Even apart from the discriminatory nature of Section 352 there is no rational nexus between the mere residence abroad of a citizen and any of the evils

with which Congress may deal. Congress may not, as a means for solving administrative problems or relieving administrative burdens, attach loss of citizenship to an act such as mere residence abroad which is clearly consistent with allegiance to this country. Congress may attach expatriation only to an act which entails the acquisition of a foreign citizenship or which, through participation in the political affairs of a foreign country, is inconsistent with retention of American citizenship. *Perez* v. *Brownell*, 356 U.S. 44

III

Section 352 imposes expatriation as a penalty without the safeguards guaranteed by the Fifth and Sixth Amendments. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144. Since Congress has assumed that a naturalized citizen who resides abroad for the stated period of time has abandoned his allegiance to his adopted country, a naturalized citizen coming within the scope of the statute stands convicted of disloyalty and is punished by forefeiture of his citizenship. He is given no hearing, no specific charges, no chance to defend himself against the allegation of disloyalty. He is punished without trial.

IV

Even if the section was considered to be regulatory rather than penal, it fails to meet the due process requirements of the Fifth Amendment because it is based on a conclusive presumption that naturalized citizens residing abroad have abandoned their allegiance to the United States. This presumption is not only clearly arbitrary in substance, but it also takes away a most valuable right without giving the citizen the opportunity to defend himself against the presumption of dis-

loyalty in accordance with the procedural standards of fair hearing required by the due process clause of the Fifth Amendment.

V

The penalty of loss of citizenship imposed by Section 352 constitutes a cruel and unusual punishment within the meaning of the Eighth Amendment. *Trop* v. *Dulles*, 356 U.S. 86.

ARGUMENT

I. SECTION 352 ARBITRARILY DISCRIMINATES AGAINST NATURALIZED CITIZENS IN VIOLATION OF THE FIFTH AMENDMENT'S GUARANTEE OF DUE PROCESS

This case marks the first time that this Court is presented with a question involving the constitutionality of a statute containing a substantive discrimination between native-born and naturalized citizens of the United States.

The reason that this Court has never had any occasion to rule on any such discrimination in the past is that this is the first and only substantive discrimination between native-born and naturalized citizens Congress has ever attempted. The provision is a new one. It first became part of our law with the passage of the Nationality Act of 1940, 54 Stat. 1170.

The challanged legislation (now Section 352 of the Immigration and Nationality Act of 1952, 66 Stat. 269, 8 U.S.C. § 1484) purports *automatically* to deprive naturalized citizens of their nationality because of continuous residence in the territory of a foreign state, either the state of origin where the period is three years, or any foreign state where the period is five years.

No comparable provision applies to native-born citizens. A native-born citizen is free to reside abroad indefinitely without suffering loss of citizenship.

Sections 353 and 354 of the Act (8 U.S.C. §§ 1485 and 1486) contain a list of exemptions from the discriminatory deprivation of citizenship embodied in Section 352. The exemptions are detailed. They are applied by the Congress as a matter of grace defining, as a matter of policy, which groups of naturalized citizens shall be exempted from the general prohibition of long-time residence abroad applicable to the remaining body of naturalized citizens on pain of loss of citizenship. No such prohibition and no such limitation is applied to their fellow citizens who obtained their citizenship by birth.

It is appellant's position that the discriminatory and arbitrary denial of citizenship to one class of Americans under Section 352 violates the Fifth Amendment's prohibition against depriving any person of life, liberty or property without due process of law. The discrimination is "so unjustifiable as to be violative of due process." *Bolling* v. *Sharpe*, 347 U.S. 497, 499.

This discriminatory aspect of the challenged statute was the "chief basis" for the dissent below by Judge Fahy. (R. 60), 218 F. Supp. at 319.

The discrimination plainly limits the rights of naturalized citizens to live and work abroad in a way that is not applied to native-born citizens. It creates, a second-class citizenship. The statute is an assertion by Congress of the power to control and restrict the rights of that great class of citizens who acquired their citizenship by naturalization to live, work and

marry where they please, while other citizens are free from such restraints.

As we shall show below, this relegation of naturalized citizens to a second-class citizenship status is completely contrary to the principle of equality of all citizens regardless of the manner in which they acquired their citizenship, as clearly expressed in the Constitution and in the decisions of this Court. This second-class citizenship status is based on the arbitrary, invidious and constitutionally impermissible assumption that naturalized citizens, as a class, are less reliable and bear less allegiance to this country than do the native-born.

This broad discrimination against all naturalized citizens cannot, as we shall further show, be sustained as an exercise of the foreign affairs power or any other power granted to Congress. Nor is there any rational justification under the foreign affairs power for the severe inequality of treatment created by the statute which takes away from naturalized citizens who reside abroad the most precious right of citizenship, but leaves the native-born free to reside abroad for any length of time without the slightest adverse consequence.

This discrimination cannot be squared with the Fifth Amendment to the Constitution.

A. The Discrimination as It Affects Appellant

If appellant were a native-born citizen, she would be perfectly free to live abroad with her husband without losing her citizenship. However, if the challenged legislation is valid, Angelika Schneider, as a naturalized citizen, after a period of three years residence abroad must choose between giving up her American citizenship or abandoning her marital obligation to stay with her husband at his foreign residence.

As Judge Fahy stated in his dissenting opinion below:

> "* * * she is put to the choice of abandoning either her husband or her nationality. No comparable choice is required of a national born on American soil who lives abroad in like circumstances." (R. 65), 218 F. Supp. at 321.

A native-born woman can live with her husband abroad and yet retain her American citizenship simply because she desires to retain her identity as an American. Angelika Schneider, as a naturalized citizen, under the statute, is automatically stripped of her American citizenship contrary to her intentions, her feelings and her political allegiance.

Appellant came to the United States when she was not quite five years of age (R. 2, 9, 17). She attended grade school and high school in suburbs of New York, and obtained her college education at Smith College (R. 2, 9). As a natural result of her education in the American schools and spending the years of her principal development in the United States, appellant is thoroughly American, and is attached to the United States. She is familiar with our system of constitutional government and personal rights, and any other government is necessarily foreign to her. She "regards" herself "as an American, and has no political loyalty or allegiance to either Germany or any other country except the United States." (R. 9). Her affidavit in these proceedings shows why she regards herself as an American and why she desires to retain her citizenship with the only country which has her allegiance. We quote:

> "4. I feel myself an American and I value my American citizenship highly. Practically all my

relatives, except my husband and children, live in the United States and are American citizens. These include two brothers, a half brother and sister. (R. 7)

"5. I regard the United States as my country. I have had all my schooling (grade school, high school and college) in the United States except for some post-graduate work in Switzerland and France." (R. 7-8)

* * *

"8. I regard myself as an American. I have spent my entire childhood and youth in the United States and regard it as my country. From the time I was five until I came to Germany in 1956 to be married, I had been in Germany only briefly in 1954 and 1955 travelling through and have neither felt nor had any connection with that country. I have no political loyalty or allegiance to either Germany or any other country except the United States." (R. 9)

* * *

"6. * * * Instead, as a result of the action of the State Department in taking away my passport and my naturalization certificate, I am faced with a choice of giving up my husband and family life with him, or of being forced to give up my country. I do not wish to accept either alternative. I wish to be an American citizen which I feel myself to be and also to remain with my husband and our children in Germany where he practices his profession." (R. 8)

* * *

"22. I understand that the statutes involved apparently require the results reached by the State Department. I cannot believe, however, that the Constitution of the United States permits me to be faced with the cruel choice of surrending either my family or my country. I have, accordingly, directed the institution of the necessary

> proceedings to establish what I believe to be the true and just conclusion that I, although naturalized, have the same freedom as any American girl who received her citizenship by birth to marry where I please and to live with my husband and family without giving up my American citizenship." (R. 12)

There is nothing to distinguish appellant from any other American girl who resides with her husband abroad except the fact of her birth in Germany. Under Section 352, however, this fact alone operates automatically to deprive petitioner of her American citizenship.

Because of this provision petitioner now lives in Germany as a stateless person (R. 8). After having been raised here and under our institutions, she finds herself abandoned by her country, and subject to the mercy of governments in Germany or elsewhere, wherever she may be, whom she regards as alien.

The District Court did not question appellant's statement that she is an "American by training in thought and in feeling, and that she values highly her American citizenship." The Court, however, states that:

> ". . . these sentiments, however sincere, were not conducive to her retention of residence in the United States." (R. 53), 218 F. Supp. at 315.[1a]

[1a] As Judge Fahy, in his dissenting opinion (R. 65), n. 10, 218 F. Supp. at 321, commented with respect to this statement:

> ". . . But Congress has not indicated in the legislation under consideration that its purpose was to keep Americans at home, but rather to promote the smooth working of our foreign relations. Furthermore, we must not confuse the problem in this case with the problem of fraudulent acquisition of citizenship, separately dealt with under the 1940 legislation."

The District Court here clearly pinpoints the discriminatory character of the legislation. Naturalized citizens are required to reside in the United States, and if they do not do so, are deprived of their citizenship, regardless of their allegiance to this country. Native-born citizens are free to reside where they please, and will not lose their citizenship no matter how long they reside abroad or how tenuous their ties to this country may be.

B. The Discriminatory Statute Takes Away Citizenship Validly Secured in Good Faith With the Intent to Reside Permanently in the United States

Section 352 operates to take away American citizenship acquired in good faith with the required intention to reside permanently in the United States. It is applicable independently of the good faith of the naturalization and applies to all naturalized citizens irrespective of their intentions at the time of naturalization. It does not purport to challenge and relate back to the original naturalization. Instead it proceeds on the theory that a validly naturalized citizen can be deprived of his citizenship, if he takes up foreign residence many years after naturalization and on account of circumstances completely unforeseeable at the time of naturalization. This is plainly demonstrated by the present case. There is in this case no question of petitioner's bona fide intention to reside permanently in the United States at the time of her acquisition of citizenship, nor has the Government or the District Court so suggested. Appellant was naturalized in 1950 at the age of sixteen, having resided in the United States since 1939 (R. 9, 17). At the time she acquired her citizenship she had just graduated from high school and was beginning her freshman year at Smith college

(R. 9). She could not have known or suspected that years later she would meet and marry Dr. Schneider and live with him in Germany.

Yet the statute seeks to take away citizenship acquired in good faith, on the basis of events not contemplated or foreseeable. If sought to be sustained as an attack on the original naturalization, it would clearly be arbitrary. *Cf. Bailey* v. *Alabama*, 219 U.S. 219; *Tot* v. *United States*, 319 U.S. 463; *Heiner* v. *Donnan*, 285 U.S. 312.

The entirely different problem of the alien who acquires American citizenship with no intention to make the United States his home, but only for the purpose of receiving the advantages of an American passport or American diplomatic protection is adequately covered by another provision of the Act.

Section 340(d) of the Immigration and Naturalization Act of 1952, 8 U.S.C. § 1451(d), meets this problem by establishing a rebuttable presumption that a naturalized citizen who, within five years of his naturalization, returns to his country of origin, or goes to any other foreign country, lacked the required intention to reside permanently in the United States at the time he applied for naturalization. If this presumption is not rebutted the naturalization may be set aside as having been acquired by fraud.[2]

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[2] Section 340(d), 8 U.S.C. § 1451(d), originally enacted as a part of the Naturalization Act of 1906, 34 Stat. 596, reads in pertinent part as follows:

> "If a person who shall have been naturalized shall, within five years after such naturalization, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention on the part of such person to reside permanently in the United States at the time of filing

This Court in *Luria* v. *United States*, 231 U.S. 9 sustained this provision, as embodied in an earlier Act, as a proper exercise of the naturalization power. This Court warned, however, this presumption, if unreasonably applied, could deprive naturalized citizens of their constitutional rights. In *Luria* this Court stated, 231 U.S. at 27:

> "* * * But we are of the opinion as the intervening time approaches five years the presumption necessarily must weaken to such a degree as to acquire but slight countervailing evidence to overcome it . . . So construed we think the provision is not an excess of the power of Congress."

Section 352, since it operates to deprive validly naturalized citizens of their citizenship and does not challenge or relate back to the original naturalization, cannot, as was the presumption in *Luria*, be sustained as a proper exercise of naturalization power.[3]

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his petition for naturalization, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the revocation and setting aside of the order admitting such person to citizenship and the cancellation of the certificate of naturalization as having been obtained by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively. . . ."

[3] While the Government has not attempted to sustain Section 352 as an exercise of the naturalization power the legislative history of the 1940 Act indicates that the provisions now contained in Section 352 were erroneously sought to be justified as a proper exercise of the naturalization power designed to expatriate persons who acquired United States citizenship without ever having had the required intention to reside permanently in the United States.

Thus, for example, the Cabinet Committee which recommended passage of the Act observed:

C. The Discrimination Creates a Second-Class Citizenship and Is Invidious in Its Nature

The discrimination between naturalized and native-born citizens contained in Section 352 could not be sustained under the Constitution even assuming *arguendo* that it could be rationally justified as tending to extend some legitimate Congressional objectives.

This is because: (1) The effect of "these provisions for loss of nationality, limited to naturalized citizens," is to "create a second class citizenship status"[4] for naturalized citizens; (2) This second class citizenship status is premised on the theory that naturalized citizens as a class are less loyal to this country than the native-born.

"The admission of an alien to the privilege of American citizenship is subject to the condition that he intend to reside permanently in the United States and perform the duty of citizenship. When a naturalized citizen abandons his residence in the United States and takes up residence in the State of which he was formerly a national, definite termination of his American citizenship should follow." (Nationality Law of the United States (1938), part 1, House Committee Print, 76th Cong., 1st Sess., p. 70.)

Mr. Flournoy, Assistant Legal Advisor of the Department of State similarly stated:

"I do not know why a person who obtained naturalization upon a statement under oath that he intends to reside permanently in the United States should retain citizenship if he goes and lives for some long period even in a third country. Of course, the cases that give us most trouble are those cases of persons who go back to their native land * * *" (Hearings Before the Committee on Immigration and Naturalization, H.R. 6127, superseded by H.R. 9980, 76th Cong., 1st Sess., p. 141 (1940)).

[4] Report of the President's Commission on Immigration and Naturalization, *Whom We Shall Welcome*, 1953: p. 239.

A second class citizenship status based on the mode of acquisition of citizenship is unprecedented and contrary to established constitutional principles. It is clearly not permitted under the Constitution where, as here, the second class citizenship is imposed on the basis of an invidious discrimination against citizens of foreign birth. Such classifications of citizens on the basis of birth of national origin are "by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States*, 320 U.S. 81, 100.[5]

1. The Second Class Citizenship Status Created By the Statute

Section 352 creates two classes of citizens. The native-born is free to reside abroad for any length of time and for any purpose regardless of allegiance and regardless of whether such residence may give rise to any foreign affairs problems. Naturalized citizens, on the other hand, have a citizenship which is conditioned upon their continued residence in the United States. As demonstrated by the facts of this case, naturalized citizens lose their citizenship by residing abroad even though they retain their allegiance to the United States, and their residence abroad gives no rise to any foreign affairs problems.

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[5] President Lyndon Johnson in his State of the Union Message on January 9, 1964 stated:

> "We must also lift by legislation the bars of discrimination against those who seek entry into our country, particularly those with much needed skills and those joining their families. In establishing preferences, a nation that was built by the immigrants of all lands can ask those who now seek admission: What can you do for our country? *But we should not be asking: In what country were you born?*" (Emphasis supplied)

Under Section 352, as we have seen (1(B) above), it is not enough that a naturalized citizen had the required intention to reside in the United States at the time he acquired his citizenship. After he acquires his citizenship, he is obliged to reside in the United States if he wishes to retain his citizenship unless he comes within one of the exceptions which Congress as a matter of grace has provided in Sections 353 and 354 of the Act. It makes the citizenship of naturalized citizens conditional upon residence, while the citizenship of the native-born is subject to no such condition. The legislative history makes it quite clear that it was just such a condition on citizenship acquired by naturalization which the legislation was intended to impose. As the Cabinet Committee recommending the legislation stated:

> "... before an alien is admitted to the privilege of citizenship, under the laws of the United States, he is required to declare under oath that he intends to reside in the United States, and, if he fails to observe this obligation, he cannot complain of the withdrawal of the privilege granted." (Nationality Laws of the United States, (1938), part 1, House Committee Print, 76th Cong., 1st Sess. p. 70).[4]

The challenged legislation is an assertion by Congress of the power to limit and condition the rights of naturalized citizens; to create a type of citizenship subject to restrictions which are not and presumably could not be imposed on the native-born.

It is an assertion of a right which, if sustained, cannot be limited by the present scope of the statute and its exemptions. It is, in substance, a claim of right on

[4] See also material quoted in note 3.

the part of the Congress to say to naturalized citizens that they have no right to travel or remain outside the borders of the United States except under terms and conditions which Congress, as a matter of grace, may allow, while no such limitation is made on their fellow citizens who owe their citizenship to birth.[7]

Indeed, Congress could not impose a similar control over the residence abroad of citizens generally.

Travel, which of course includes the right to remain abroad for any legitimate purpose, is a fundamental aspect of the personal liberty protected by the due process clause of the Fifth Amendment. *Kent* v. *Dulles*, 357 U.S. 116, 125-128. In *Kent*, this Court stated (357 U.S. at 126):

> "Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as

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[7] One irony of the terms and conditions presently in force is that appellant, by reason of her more than 15 years residence in the United States, was free to marry and live abroad without loss of citizenshih provided it was not in Germany. See 73 Stat. 274, 8 U.S.C.A. § 1486(5), exempting 15-year residents from the 5-year limitation on residence in countries other than the country of birth but not from the 3-year limitation on residence in the country of origin. Had appellant married an Austrian, a Swiss, or even a resident of Communist China, she could have lived with her husband in any of these countries secure in her American citizenship for life.

We do not here quarrel with the line which Congress has chosen to draw, however absurd it may seem on its face. We use it only to emphasize that in asserting the power to draw any line based on residence abroad, Congress is asserting a general power to restrict or forbid travel or residence abroad and that its exemption or failure to exempt from the penalty of loss of citizenship is solely a matter of grace.

> the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values. . . ."

This Court then quoted at length from Professor Chafee's explanation of the extent of that liberty, citing in particular "reasons close to the core of personal life—*marriage*, reuniting families, spending hours with old friends." (*Ibid.*, emphasis supplied).

The only basis for the restrictions which Section 352 imposes on the naturalized citizen is that the naturalized citizen possesses a class of citizenship which may be made subject to special restrictions.

The Constitution, however, does not empower Congress to create different classes of citizenship. Under the Constitution, there is only one citizenship of the United States. Persons may, of course, acquire citizenship by different means. A person may be born a citizen of the United States, or obtain citizenship through naturalization. Congress may, of course, pass laws stating under what circumstances citizenship is acquired by birth (Section 301 of the Immigration and Nationality Act of 1952, 8 U.S.C., § 1401) and may, as the Constitution expressly provides, "establish a uniform Rule of Naturalization" (Constitution, Art. 1, Section 8, Cl. 4). A person who claims to be a native-born citizen may be denied the rights of citizenship and even deported upon judicial determination that his claim of citizenship is false. *Ng Fung Ho* v. *White*, 259 U.S. 276, 281-284. Similarly, the citizenship of a person who was naturalized by making a false statement on his application for naturalization may be revoked by judicial action. Section 340 (d) of the Act, 8 U.S.C. Section 1451(d), *Luria* v. *United States*, 231 U.S. 9.

However, once a person has validly become a citizen of the United States, be it by birth or by naturalization, his rights as a citizen are the same as those of every other citizen. Congress cannot create a class of citizens whose rights or obligations are greater or less than those of other citizens.

This principle of equality between native-born and naturalized citizens has been clearly expressed in the opinions of this Court.

The classic formulation of this principle is found in the opinion of Chief Justice Marshall in *Osborn* v. *The Bank of the United States,* 22 U.S. (9 Wheat.) 738, 827-828:

> "A naturalized citizen is indeed made a citizen under an act of Congress, but the act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, possessing all the rights of a native citizen, and standing, in view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The constitution then takes him up, and, among other rights, extends to him the capacity of suing in the courts of the United States, precisely under the same circumstances under which a native might use. He is distinguishable in nothing from a native citizen, except so far as the constitution makes the distinction. The law makes none."

See also *United States* v. *Wong Kim Ark,* 169 U.S. 649.

Nearly a century later this Court said in *Luria* v. *United States*, 231 U.S. 9, 21

> "Under our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respect, save only that of eligibility to the presidency."

For similar but more recent statements, see *United States* v. *MacIntosh*, 283 U.S. 605, 624; *Knauer* v. *United States*, 328 U.S. 654, 658).[8]

Moreover, this principle of equality is also clear from the plain language of the Fourteenth Amendment to the Constitution which provides without any distinction for the citizenship of

> "All persons *born or naturalized* in the United States . . . ." (emphasis supplied)

As Judge Fahy stated in his dissenting opinion below (R. 64), 218 F. Supp. at 320:

> "The inequality in treatment arises after American nationality has been conferred. This is contrary to the general policy of our laws to maintain equality in the status of citizens. A difference which antedates naturalization may not readily be revived after citizenship is acquired and by such revival create a more vulnerable type of citizenship than is possessed by the native born."

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[8] See also the dissenting opinion of Chief Justice Warren in *Perez* v. *Brownell*, 356 U.S. 44, 56, where he states:

> ". . . of course, naturalization unlawfully procured may be set aside. But apart from this circumstance the status of the naturalized citizens is secure."

And the concurring opinion of Mr. Justice Douglas in *United States* v. *Minker*, 350 U.S. 179, 197:

> "The citizenship of naturalized persons has the same dignity and status as the citizenship of those born here, save only for eligibility for the Presidency."

Section 352 marks the first attempt by Congress to depart from the firmly established constitutional principle of equality between native-born and naturalized citizens.

This discrimination in Section 352, which first became part of our law with the passage of the Nationality Act of 1940, is the *first* and *only* discrimination between native-born and naturalized that Congress has ever attempted. It is the single substantive exception to the deeply rooted principle that native-born and naturalized citizens are equal in every respect (with the single exception of the constitutional provision limiting the Presidency of the United States to the native-born.) See *Luria* v. *United States, supra,* 231 U.S. 9, 21.

A prior distinction between native-born and naturalized citizens appears in the Act of March 2, 1907, 34 Stat. 1228, but it was a procedural not a substantive one.* The 1907 Act provided that if a naturalized citizen resided for two years in a foreign state from which he came or five years in another foreign state, a presumption would arise that he had voluntarily

* Act of March 2, 1907, 34 Stat. 1228:

"Sec. 2.

. . .

"When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided*, however, that such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State many prescribe; *And provided also*, that no American citizen shall be allowed to expatriate himself when this country is at war."

abandoned his citizenship. Under this statute such a presumption could be overcome "by the presentation of satisfactory evidence to a diplomatic or consular officer of the United States." It was, as this Court stated in *United States* v. *Gay*, 264 U.S. 353, 358, "a presumption easy to preclude, and easy to overcome. It is a matter of option and intent." This Act was nothing more than a requirement to state clearly an intention to continue allegiance to the United States. Furthermore, even in a case where the presumption should prevail, the effect, according to a ruling made by Attorney General Wickersham, 28 Op. Attny. Gen. 504 (1910), was only loss of diplomatic protection and not an actual loss of citizenship. Indeed, the Act had no application to a citizen who returned to the United States no matter how long he had stayed abroad. *Ibid.*

Thus the 1907 Act provided only a yardstick for voluntary and intentional expatriation. It imposed on the naturalized citizen residing abroad only the burden of avowing his continued allegiance to the United States. It did not deprive loyal American citizens of their citizenship on grounds of mere residence abroad. *United States* v. *Gay, supra.* See also *Miller* v. *Sinjen*, 289 F. 388 (8th Cir. 1923); *Camarado* v. *Tillinghast*, 29 F.2d 527 (1st Cir. 1928); *United States* v. *Eliasen*, 11 F.2d 785 (W.D. Wash. 1926).

The challenged legislation for the first time in our history makes naturalized citizens subject to special conditions and restrictions of a substantive nature. If the statute is upheld, it will make naturalized citizens nothing more than citizens on probation, not entitled to the full rights of American citizenship enjoyed by the native-born. It would relegate naturalized citi-

zens to a second-class citizen status. Such a result would be plainly contrary to the plain meaning and spirit of the Constitution as it has been construed by this Court.

2. Invidious Nature of the Discrimination

The second-class citizen status for naturalized citizens created by Section 352 also cannot pass muster under the Constitution because it is based on the theory that naturalized citizens as a class are less reliable than the native-born and more likely to abandon their allegiance to this country.

Classifications of citizens on the basis of birth or national origin "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality" and are suspect even when justified by the most extreme wartime emergency. *Hirabayashi* v. *United States, supra,* 320 U.S. 81, 100.

It is appellant's position that under no circumstances can Congress make, by a general law applicable in times of peace as well as emergency, invidious discriminations between citizens which result in the creation of "second-class citizenship" for some. Yet this is the unequivocal result of Section 352.

The legislative history, as demonstrated under (I)(D)(1) below, clearly shows that Section 352 was premised on the theory that naturalized citizens who reside abroad are as a class "nominal citizens" who for all intents and purpose may be assumed to have abandoned their allegiance to this country. No similar derrogatory assumption is, of course, made with respect to native-born citizens residing abroad.

The invidious nature of this discrimination becomes even more clearly evident from the exemptions for

which to a very limited extent have softened the broad sweep of Section 352. These exemptions indicate perhaps better than anything else that these provisions presuppose an inferior status on the part of the naturalized citizens. Under these exemptions a naturalized citizen can earn the right to reside abroad, a right held by every native-born citizen, if, for example, he is a veteran of the Spanish American War, World I, World War II or the Korean War, Section 354(1), receives a compensation from the Government of the United States on account of a disability incurred in Government service, Section 353(2), or does work which "in the opinion of the Secretary of State directly benefits trade or commerce." Section 354(2).

Under these exemptions a naturalized citizen is granted, as a matter of grace, as a special reward or upon establishing special merit, the right to be treated equally with and to be considered as reliable as a native-born citizen.

Accordingly, it is the clear premise of this legislation that naturalized citizens as a group may be assumed to lack allegiance to the United States unless they escape from this inferior category of citizens, by qualifying under one of the exemptions referred to above.

Congress, we submit, may never enact legislation to restrict a group of citizens on a discriminatory basis on the theory that one group of citizens—*as a group*—are more likely to lack allegiance to the United States than another.

Such group legislation, particularly when based on national origin, is simply not permitted by the Constitution. Such group legislation may of course be

more simple to administer. But our Constitution, protects personal rights and does not allow Congress or the Government the administrative convenience of such legislation. Congress may not restrict the rights of a group of citizens on the basis of such factors as race, ancestry or national origin. Even if it were proved that such a group were more prone to involvement in certain problems than other groups, Congress must deal directly with the act which it considers evil and not with the group which it believes may be more likely to commit such an act. Otherwise it would no doubt be possible to justify many classifications between groups of citizens on a so-called "rational" basis. No doubt evidence could be presented showing that certain characteristics or propensities exist more among citizens of certain national origins than others. This, however, does not mean that Congress may base legislation on the basis of such factors. So far as Congress is concerned, such factors under our system of Government, are and must be completely irrelevant.[10]

The Congress has no power to segment and compartmentalize the citizenry and regulate them on the basis of assumed characteristics or tendencies of their race, religion, national origin or economic class. It must apply the same consequences to the same act whether or not, *a priori* or even on the basis of past conduct substantiated by statistics, it was more likely to be com-

[10] The absurdities of the contrary approach here suggested by the Government are endless, *e.g.*, since experience teachs that those guilty of petty larceney are most often poor, and those guilty of violations of the antitrust laws are most often not poor presumably a rebuttable or conclusive presumption could be applied to persons charged with such crimes depending only on proof of their economic status. This would certainly eliminate administrative inconvenience and would avoid trials which are "cumbersome, long-drawn out and expensive to the Government." See I(D)(1).

mitted by a Jew, a Catholic, a Negro or a naturalized citizen, or indeed a poor man or a rich man.

The District Court has been able to cite only a single case where this Court has upheld a discrimination based on a factor such as national origin. *Hirabayashi* v. *United States, supra,* 320 U.S. 81.[11] There the classification, as the Court expressly stated, was upheld only because of the existence of war and the imminent threat of invasion. In *Hirabayashi,* 320 U.S. at 100, this Court said:

> "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection. . . . We may assume that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas."

The problems asserted to attend the residence abroad of naturalized citizens cannot be even remotely compared with the threat of immihent invasion. Yet short of such an imminent danger it is clear that the classification of persons on such a basis as foreign birth is prohibited under our Constitution.

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[11] The other cases relied on by the District Court did not involve any classification on a basis of national origin. *Cafeteria Workers* v. *McElroy,* 367 U.S. 886, 895, involved no classification of any kind. *McKenzie* v. *Hare,* 239 U.S. 299, *West Coast Hotel Co.* v. *Parrish,* 300 U.S. 379 and *Hoyt* v. *Florida,* 368 U.S. 57 all involved different treatment of men and women.

D. Discrimination Cannot Be Justified as a Proper Exercise of the Foreign Affairs Power as There Is No Rational Nexus Between the Discrimination and That Power

The District Court held that the discrimination involved in Section 352 may be justified as a proper exercise of Congress' foreign affairs power.

As shown above, it is our position that the discrimination between native-born and naturalized citizens, which Congress has attempted, is not permissible even if it would assist in the conduct of the foreign affairs of the United States.

In any event, however, the discrimination embodied in Section 352 cannot be justified as an exercise of the foreign affairs power.

"The means—in this case withdrawal of citizenship" of naturalized citizens *on a discriminatory basis*—is not "reasonably related to the end—here, regulation of foreign affairs." *Perez* v. *Brownell,* 356 U.S. at 58.

The required rational nexus is lacking here because the mere residence abroad of naturalized citizens has not been indicated to give rise to any problems relating to the conduct of foreign affairs which could justify the restrictions imposed broadly on naturalized citizens.

Even assuming, however, that Congress reasonably concluded that foreign affairs problems were more likely to arise from residence abroad of naturalized citizens, the means Congress has selected, the discriminatory deprivation of the "most precious right of citizenship," *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, 159, is clearly out of all proportion to any possible problems which might be raised by residence abroad of naturalized citizens.

1. The Administrative Convention of the Discrimination as Compared to Determination of Allegiance on an Individual Basis Cannot Justify the Legislation

The real purpose of Congress in enacting this legislation was to take away the citizenship of naturalized citizens who reside abroad, not because of any special foreign affairs problems caused by such residence, but because it concluded that naturalized citizens residing abroad may, as a group, be assumed to be only nominal citizens. Therefore, the Congress felt that it was not worth the effort of the Government (1) to provide naturalized citizens residing abroad with diplomatic protection and other benefits of American citizenship or (2) even to determine on a case by case basis whether an individual naturalized citizen had in fact abandoned his allegiance to this country.

This purpose is clearly reflected in the legislative history.

Thus, for example, Chairman Dickstein of the House Committee said that the bill would

> "relieve this country of the responsibility of those who reside in foreign lands and *only claim citizenship when it serves their purpose.*" (86 Cong. Rec. 11944). (Emphasis supplied)[12]

Congressman Rees, stated, 86 Cong. Rec. 11948, that naturalized citizens residing abroad are "not likely to have any real attachment to the principles of the Constitution of the United States."

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[12] The Congressman meant, of course, citizens who claimed rights, but refused responsibility. Of course, citizens who have not failed in their allegiance have a right to claim citizenship and the protection of the Government "when it serves their purpose."

The Senate report on the bill has stated (S. Rep. No. 2150, 76th Cong., 3d Sess., p. 4):

> "These provisions for loss of nationality by residence abroad would greatly lessen the task of the United States in protecting through the Department of State *nominal citizens* of this country who are abroad *but whose real interests, as shown by the conditions of their foreign stay, are not in this country.*" (Emphasis supplied)

Similarly, the Cabinet Committee Report, Nationality Laws of the United States, *supra*, p. 71, stated:

> "Needless to say, naturalized citizens who resume residence in the foreign lands from which they came are apt to renew old associations and ways of living and thinking, and thus become merged in the native population, losing, to a great degree, if not completely, their American character and feeling. This makes it all the more desirable that their American nationality, and not merely their right to the diplomatic protection of this Government, should be terminated."

Furthermore, the Cabinet Committee, which proposed the challenged legislation, cited thirteen cases as typical of the problems with which the statute should deal. Nationality Laws of the United States, *supra*, 72-75. None of these cases involved any alleged difficulties with foreign countries resulting from the fact that the naturalized citizen was residing in his country of origin. All of them were merely cases of protracted residence abroad, and most involved a breaking of all ties with this country.

The Cabinet Committee expressly rejected a determination of continued allegiance to the United States on an individual basis. It did so because such a deter-

mination would represent administrative difficulties, and because "proceedings in the courts would be cumbersome, long-drawn out and expensive to the Government. . . ." Nationality Laws of the United States, 1938, *supra*, p. 70. Judge Fahy in his dissenting opinion refers to this administrative convenience as "the principal basis advanced for the remedy." (R. 59), 218 F. Supp. at 318.

Accordingly, the legislation appears to have been enacted not, as the District Court believed, to deal with a special source of friction between the United States and other countries, but as a matter of administrative convenience to the Department of State in dealing with citizens residing abroad who have no allegiance to this country.[13]

The legislation clearly cannot be sustained on such grounds. As Judge Fahy stated in his dissenting opinion, such legislation "would seem to call for justification under the foreign relations power by some

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[13] The Cabinet Committee report relied on by the District Court (R. 44), 218 F. Supp. 309-310 also states that

> "• • • a definite provision for the termination of American nationality in these cases will have the effect of persuading foreign states with which the United States has no treaties of naturalized citizens to conclude such treaties and to recognize the American nationality of the persons concerned when they return to their countries of origin for legitimate objects and for residence of a temporary character." (Nationality Laws of the United States, *supra* p. 71.)

The legislative history does not mention, however, any incidents where foreign states refused to recognize American naturalized citizens. None of the thirteen typical cases presented to Congress involved such a refusal. Nor does the legislative history indicate that this was the problem with which Congress was concerned in enacting this legislation. Furthermore, the United States does not appear to have entered into any naturalization treaties since the enactment of this legislation.

more urgent public necessity than substituting administrative convenience for the individual right of which the citizen is deprived." (R. 63), 218 F. Supp. at 320.

Moreover, as shown under I(C)(2) above, the Constitution does not permit Congress to legislate on the assumption that naturalized citizens are the class more likely to abandon their allegiance than the native-born.

In addition, this assumption on which this legislation is based is unsubstantiated, entirely without any basis, and plainly cannot justify the discrimination.

Naturalized citizens who, years after their naturalization, take residence in the state of their former nationality, or in some other state, for family, health or business reasons unforseeable at the time of their naturalization, generally do so without in the slightest way surrendering their identity as Americans. Such residence abroad does not mean or imply reversion of the naturalized citizen to his former allegiance. Indeed, a naturalized American citizen who made the deliberate choice to become an American citizen may be expected to be as proud of his American citizenship and as insistent on retaining his identity as an American as a native-born citizen who holds his citizenship by the accident of birth. Naturalized Americans abroad by reason of their understanding of the customs and language of their native countries may, in fact, be the best representatives of this country and interpreters of the virtues of its institutions. Nor need one elaborate the point that in the present state of international affairs such interpreters should be encouraged and not repudiated.

Nor, particularly in these days of fast and low cost international travel, does residence abroad carry with

it a rupture of the ties with this country. A person may reside in a foreign country yet make regular visits in the United States to keep intact contacts with family, friends and country. But regular visits to this country (even if frequent) do not protect a naturalized citizen from loss of citizenship as a result of residence abroad for the stated periods. In Section 101(a)(33) of the Act the term "residence" is defined as follows:

> "The term 'residence' means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent. Residence shall be considered continuous for the purposes of Section 350 and 352 of this title where there is a continuity of stay but not necessarily an uninterrupted physical presence in a foreign state or states or outside the United States."

Thus, a naturalized citizen will lose his citizenship under Section 352 even though he comes to his country regularly from his place of abode elsewhere.

That a naturalized citizen by residing abroad cannot be assumed to have abandoned for all intents and purposes his American citizenship and broken his ties with his country will be evident from the facts of this case. Appellant resides in Germany only because she is married to a husband who practices his profession there. (R. 10). Appellant left Germany when she was at the age of four. That she took up residence there many years later for a purpose plainly not contemplated when she left as a child, or when she was naturalized as a school girl, does not mean that she has in effect abandoned her allegiance and interests in the United States any more than in the case of a native-born who marries a nonresident. (R. 9) To the contrary, as

she stated in her affidavit filed in support of her motion for summary judgment, appellant feels herself as an American and wishes to retain her American citizenship. (R. 7-9) Nor does appellant's residence in Germany mean that she has disrupted her ties with her relatives, practically all of whom live in the United States (R. 7), and with friends she made during her long years of schooling and residence here. (R. 9) Appellant's ties with the United States remain in being the same as those of any other American woman who happened to be married to a husband who practices his business or profession abroad. As is typical for most Americans who, for marriage or other reasons must reside abroad, appellant visited this country for six weeks in 1957 to show her first-born son to her relatives and friends.[14]

Unquestionably the person who resides abroad as an American citizen, but who has no allegiance to the United States, represents a problem with which Congress may deal. To deal with this problem Congress has attached expatriation to certain acts demonstrative of lack of allegiance to the United States whether they be performed by native-born or naturalized citizens. (Section 349 of the Act). Other similar measures may be possible. It is clear, however, that this problem cannot be dealt with by depriving naturalized citizens who reside abroad of their citizenship regardless of the allegiance to the United States on the theory that naturalized citizens who reside abroad may be assumed as a group not to have allegiance to the United States.

[14] Although it is not in the record, appellant came here again in 1960 after the Department of State had determined she had lost her citizenship. She came here on a visit with papers that stamped her as a stateless person.

Furthermore, it is clear that the problem of the American citizen residing abroad who has in effect abandoned his allegiance to the United States is not one which is limited to naturalized citizens. Indeed, there is nothing in the legislative history to show that this is a problem which is more prevalent among naturalized citizens residing abroad than among native-born expatriates.

2. Congress Was Required to Deal With the Limited Problems Presented by More Limited Legislation

Neither the legislative history or the Government in its earlier briefs points to any problem relating to the mere residence abroad of naturalized citizens which might serve as a justification for this broad legislation affecting the rights of all naturalized citizens.

The problems which have been indicated are all special and limited problems generally not attending the residence abroad of naturalized citizens. They do so only when such residence is accompanied by other factors such as dual nationality and refusal of a foreign state to recognize American naturalization. See I(D)(4) and I(D)(5) below. Such problems, however, are not involved in the residence abroad of the appellant or of the vast number of other naturalized Americans who reside abroad. It has not been shown that any problems caused by residence abroad of naturalized citizens, when such residence is accompanied by added factors which may result in embarrassment, cannot be dealt with by specific legislation direction to these particular problems.

Of course, Congress has the authority under its foreign affairs power to enact regulatory measures designed to avoid international frictions. 'Its measures,

however, must be appropriately limited to those difficulties. In the present case, unlike *Perez* v. *Brownell*, 356 U.S. 44 "The classification Congress has adopted" is entirely "inappropriate to the difficulties to be dealt with." 365 U.S. at 59. A statute can not expatriate citizens on the basis of foreign residence where it is not the foreign residence itself which causes difficulties but some particular conduct or some situation applicable to particular persons or groups of persons. *Bailey* v. *Alabama*, 219 U.S. 219, *Tot* v. *United States*, 319 U.S. 463, *Heiner* v. *Donnan*, 285 U.S. 312. It can hardly be said that the problems caused by residence abroad when accompanied by such added factors cannot be met more discretly. As shown below, it is clear that such problems as dual nationality or the refusal of a foreign state to recognize American naturalization could be dealt with by specific and more limited legislation.

Congress did not even consider alternate, more limited means to deal with any such problems. It is incumbent upon the legislature however to act with an adequate regard for the vital interest at stake and the alternative methods of achieving the purposes of its legislation. See *Dean Milk Co.* v. *City of Madison*, 340 U.S. 249. It plainly has not done so here. Equally plainly there has been no valid exercise of foreign affairs power.

3. Even Assuming Some Classification Might Be Justified, There Is No Reasonable Basis for the Severe Inequality of Treatment Imposed by Section 352

Even if we assume that there is a reasonable basis for Congress to conclude that a naturalized citizen is more likely than the native-born to embarrass the United States in the conduct of foreign affairs, though

both live in the same foreign state for the same length of time and one bears no greater allegiance to the United States than the other, it is clear that there is no rational basis for the severe inequality of treatment Congress has imposed.

As Judge Fahy stated in his dissenting opinion below (R. 66), 218 F. Supp. at 322:

> "The difference and degree of embarrassment, if any, is not shown to be substantial enough to warrant so great a difference in the consequence meted out only to the naturalized citizen. Constitutional power should not be overextended so as to deprive plaintiff of a fundamental liberty upon so tenuous a basis."

Stated in other words, even assuming a reasonable justification may be made for different treatment of native-born and naturalized citizens for some purposes, this "does not justify the law in imposing an inequality among citizens out of proportion to the purpose for which the classification is made." (Dissenting opinion of Judge Fahy (R. 66), 218 F. Supp. at 321-322).

Denationalization, as this Court has repeatedly recognized, is an extremely harsh remedy. In *Trop* v. *Dulles, supra,* this Court held expatriation to constitute a cruel and unusual punishment. As the Chief Justice stated in that case, it results in "the total destruction of the individual's status in organized society." 356 U.S. at 101. It has been referred to as a "truly terrifying remedy" (*Mendoza-Martinez,* 372 U.S. at 187 concurring opinion, Mr. Justice Brennan), and as "drastic measure" (*Id.,* at 214, dissenting opinion of Mr. Justice Stewart). As this Court stated in *Mendoza-Martinez,* 372 U.S. at 160 "Deprivation of

citizenship—particularly American citizenship, which is 'one of the most valuable rights in the world today' . . . has grave practical consequences." This is particularly the case where loss of citizenship, as it does here, results in statelessness. An American citizen who loses his citizenship without acquiring another becomes "a person who not only has no rights as an American citizen but no membership in any national entity whatsoever," *Id.*, at 160. He has no state which can provide him with protection and "[h]is very existence is at the sufferance of the country in which he happens to find himself. While any country may accord him some rights, no country need do so because he is stateless." *Trop* v. *Dulles*, 356 U.S. at 101-102. "The stateless person may end up shunted from nation to nation, there being no one obligated or willing to receive him . . . ." *Mendoza-Martinez*, 372 U.S. at 161.[15]

Appellant here bears the full brunt of this drastic sanction. By losing her American citizenship, she has become a stateless person living in Germany at the sufferance of that Government. She is subject to the whim of foreign officials and any change of Government or policy in Germany may threaten her status. The District Court noted that appellant could probably acquire German nationality. This she does not want to do because she feels no allegiance to Germany, the country which she fled prior to the outbreak of

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[15] Indeed, this Court has never upheld a case expatriation would have resulted in statelessness. In *Perez* v. *Brownell*, 356 U.S. 44, the petitioner was also a national of Mexico. In the only other two cases upholding expatriation a foreign citizenship was acquired as a result of the expatriating act. *Savorgnan* v. *United States*, 338 U.S. 491; *Mackenzie* v. *Hare*, 239 U.S. 229.

World War II. Even if she acquired German nationality, this could not substitute for American citizenship which has been termed " 'one of the most valuable rights in the world today' ", *Mendoza-Martinez,* 372 U.S. at 160. This is particularly true for appellant who for any number of personal or political reasons may at any time desire to return to the United States.

Under Section 352 this drastic sanction is applied to naturalized citizens who reside abroad even though their residence, as that of appellant, abroad causes no embarrassment to the United States. "On the other hand a natural-born American may safely carry his nationality abroad without losing it even if his presence proves diplomatically embarrassing in the extreme . . . ." (Dissenting opinion of Judge Fahy, R. 66), 218 F. Supp. 321.

Neither the legislative history of the Act nor the Government in its briefs have pointed to any problems serious enough to justify an "inequality of so severe a character." (Dissenting opinion, Judge Fahy, (R. 66)), 218 F. Supp. at 321. As Mr. Justice Stewart in his dissenting opinion in *Mendoza,* comparing that case with *Trop,* and quoting from Mr. Justice Brennan's concurring opinion there, stated, "the harshness of denationalization for conduct so potentially equivocal was 'an important consideration where the asserted power to expatriate has only a *slight or tenuous relationship* to the granted power.' " *Mendoza-Martinez,* 372 U.S. at 214. (emphasis added)

The slight or tenuous nature of the relationship of the discriminatory withdrawal of citizenship to the granted power is well summarized in Judge Fahy's dis-

senting opinion. He states that "the relation to or nexus with the foreign affairs of naturalized citizens"

> "(1) may exist with respect to some native-born citizens who reside abroad, and is not limited to naturalized citizens; (2) is not shown to exist in all cases of naturalized citizens whose residence abroad brings them within Section 352(a)(1); (3) appears not to have been weighed by Congress in connection with the impact of Section 352(a)(1) upon the citizenship of one group of Americans vis-a-vis another; (4) is with respect to aspects of foreign affairs which are administrative and routine in nature rather than those ordinarily associated with the authority of the Executive and of Congress to conduct the foreign affairs of the nation; (5) is largely due to problems arising from dual nationality; (6) creates problems not shown to be incapable of reasonable solution by means less drastic than the total deprivation of nationality." (R. 54), 218 F. Supp. at 315

Indeed, it is clear from the majority of opinion that the District Court was unable to find a more clear or substantial relationship between the withdrawal of citizenship and the avoidance of embarrassment in the conduct of our foreign affairs. All that the District Court was able to find was "a reasonably conceivable relation between the method used and the problem which Congress saw and sought to remedy under its foreign affairs power." (R. 53), 218 F. Supp. at 314

The discriminatory withdrawal of the citizenship of naturalized citizen can not be justified on such a "slight or tenuous" or even on a "reasonably conceivable" relationship.

As Judge Fahy stated in his dissenting opinion, (R. 66-67), 218 F. Supp. at 322:

> "Perhaps the matter can be stated more simply. The Supreme Court has held in the case of a convicted deserter that denationalization is a punishment so cruel and unusual as to violate the Eighth Amendment. The Court has also held in the case of one who leaves and remains outside the jurisdiction of the United States in time of war for the purpose of evading military service that denationalization is a punishment which, if to be upheld at all, must be accompanied by the safeguards of procedural due process of law. It would seem necessarily to follow from these decisions that in the case of the plaintiff denationalization, which is just as severe as in the two cases referred to, would create such a serious inequality among Americans upon so tenuous a basis that it fails the test of reasonableness which substantive due process requires of all legislation, especially that which restricts the liberty of the citizen. What is cruel and unusual under the Eighth Amendment for the deserter *a fortiori* is unreasonable in its solitary application to a naturalized citizen under the Due Process Clause of the Fifth Amendment."

4. Nineteenth Century Problems Arising Out of Non-Recognition of American Naturalization Neither Are Nor Could Be the Basis for This Legislation

The District Court sustained this legislation on the basis of the "long history of friction between the United States and other nations relatively to this particular class of naturalized citizens." (R. 51), 218 F. Supp. at 313.

It is our position that there is no support in either the legislative history of this particular section or in the more remote diplomatic history strongly relied on by the District Court to justify Section 352 on such a basis.

To find a justification for this legislation, the District Court refers at length to the problems involving naturalized citizens during the 19th Century. The District Court states that "The many executive utterances on this subject *throughout the 19th Century* show the magnitude of the problem." (R. 37), 218 F. Supp. at 305 (emphasis supplied).

a. *The Problems in the Nineteenth Century*

These nineteenth century problems could not form the basis for the challenged legislation. These problems had been resolved by the time this provision was made law in 1940. Nor did Congress even attempt to deal with such old problems by enacting this provision. Section 352 was, as shown above, adopted on very different grounds.

During the nineteenth century the problem which faced our Government was to secure the protection of naturalized citizens while traveling or residing in his country of origin. This problem arose out of the unwillingness of many of the European countries to recognize American naturalization. These countries held to the old dogma that allegiance can not be cast off without the consent of the sovereign. "The most vexatious cases with which this Government had to deal were those where persons, natives of states of continental Europe which maintain large standing armies, came to the United States and were naturalized, and, upon return for pleasure or business to the country of their origin, were seized and drafted into the armed services." Van Dyne, *Citizenship of the United States*, 1904, pages 283-284. To such states naturalized citizens of the United States could not travel except at serious risk.

In 1868 Congress formulated into law the policy that a citizen had a right to expatriate himself, and that the country of former nationality had no call upon a naturalized citizen's services. Act of July 27, 1868, 15 Stat. 224. This law declared that "the right of expatriation is a natural and inherent right of all people . . ." and provided in Section 2 that:

> "All naturalized citizens of the United States while in foreign countries are entitled to have and shall receive from this Government the same protection of persons and property which is accorded to native-born citizens."[16]

"The immediate occasion which called forth the law was the arrest of certain naturalized citizens by their parent countries, chiefly the German states, for nonperformance of military service and numerous arrests of naturalized citizens of Irish origin in the United Kingdom charged with crimes of political character . . . Allowing for the heat occasioned by the nature of the arrests, the action of Congress . . . was taken with deliberation and with the unanimous agreement on the principle involved, and must be considered a final expression of national policy." Citizenship of the United States, Expatriation and Protection Abroad, House Doc. No. 326, 59th Cong., 2d Sess., pp. 10-11.

b. *The Naturalization Treaties*

While United States policy that naturalized citizens should receive full protection was clear, the implementation of that policy was difficult in the light of the attitudes of some of the European countries. The United States attempted to resolve these difficul-

[16] This provision is still the law, 22 U.S.C. § 1731.

ties by entering into naturalization treaties with some of the countries which were refusing to recognize American citizenship. These treaties are called the Bancroft treaties after the United States Minister to Prussia who negotiated the first such treaty with the North German Federation in 1868. 15 Stat. 615. The purpose and background of this first such treaty appears clearly from a letter sent by Mr. Seward, the Secretary of State, to Mr. Bancroft, on August 22, 1867, 3 Moore *Digest of International Law* (1906), p. 358, where he states:

> "You are familiar with the never ending dispute between this Government and those European governments which claim to exact military service from persons born within their allegiance, but who have become naturalized citizens of the United States . . . It is in our intercourse with Prussia that the question produces the most serious inconveniences.
>
> "Soon after the close of our Civil War, Count Bismarck made some offers to the United States which were conceived in a spirit of great liberality. Your predecessor . . . was hopeful that through the negotiation thus opened, the two governments might arrive at a satisfactory conclusion of the question. It soon became apparent, however, that the United States could not surrender the principle of the absolute right of expatriation, while on the other hand Prussia was not prepared to acknowledge the principle in its full extent."

The Bancroft treaties effected a compromise between the claim of the United States that the naturalized citizens were only citizens of this country and the assertion of some of the European countries that these citizens could not escape their military obligations by acquiring American citizenship. The treaties made it

safe for naturalized citizens to reside in their country of origin for a limited period of two years. After that they might become subject to the jurisdiction the foreign power and could have no assurance of protection on the part of the United States. This was clearly not regarded as an ideal solution, but a solution necessitated by the existing circumstances. The principal purpose of the treaties was not to rid the United States of naturalized citizens residing abroad. Their aim was to enable the United States to secure for naturalized citizens limited rights of protection while traveling in their country of origin rather than no protection at all. Furthermore, the Bancroft treaties did not automatically deprive citizens of their right to American citizenship upon residing for two years in the country of their origin, but only created a rebuttable presumption that a naturalized citizen who lived in his country of origin for that period intended to abandon his United States citizenship. 3 Moore's *International Law Digest* (1906), pp. 746-747, 748, 752.

c. *The 1907 Act*

In 1907 Congress, to implement the naturalization treaties and for considerations largely similar to those which led to the conclusion of the treaties, passed an Act setting a time limit on the period in which the United States would provide diplomatic protection to a naturalized citizen who resided abroad. 34 Stat. 1228 (See n. 9) The Act provided that if a naturalized citizen resided abroad for certain periods a presumption would arise that he had voluntarily abandoned his citizenship. The presumption could easily be rebutted by an expressed intent to remain a United States citizen. *United States* v. *Gay*, 264 U.S. 353.

See I(C)(1) above. This Act, also, did not deprive the person of citizenship as such, but only of the right to protection. It had no application to the citizen who returned to the United States no matter how long he had stayed abroad. 28 Op. Attny. Gen. 504 (1910).

In 1940 when Congress enacted the challenged provision, the historical problems of the 19th Century which made it necessary to limit the protection given to naturalized citizens residing abroad had been resolved. The legislative history does not indicate the existence of any such problems nor has the Government ever contended that the problems existed in 1940. Such problems were not even considered by Congress nor could they be in any way a basis for this legislation. Congress is required to deal with current problems and not to cope with problems of past generations which have been solved and are of no present concern. The problems of the middle of the nineteenth century, such as the impressment of American citizens into foreign armies, are completely irrelevant to the question whether the challenged statute was an appropriate means to deal with current problems.

d. *Isolated Cases of Refusal to Recognize Naturalization Could Not Justify Legislation*

The Government, in its earlier briefs, nonetheless has sought to justify the legislation to deal with the problem of the foreign country which refuses to recognize American naturalization.

In modern times, unlike the 19th Century, nearly all states recognize the holder of an American passport as an American citizen, and make no claim on his allegiance even though he be a former national of that

country. The Government does not contend otherwise. In this case, for example, appellant as long as she had an American passport was treated by Germany as an American, and Germany made no claim upon her.

However, even assuming that such a problem might exist with respect to a few countries, there is no indication why this now limited and unusual problem could not be resolved by legislation vastly narrower in scope than the broad restriction embodied in Section 352. For example, Congress could provide that naturalized citizens who travel to countries which do not recognize naturalization have no right to diplomatic protection. This would completely resolve any potential problem without affecting the right of naturalized citizens to reside in the overwhelming number of countries which recognize American naturalization. As shown under I(D)(2), Congress is required, especially where such vital rights as citizenship are at stake, to limit its measures to such as might be appropriate to deal with such special problems. *Perez* v. *Brownell, supra. Cf., Dean Milk Co.* v. *City of Madison,* 340 U.S. 349.

Moreover, it is not appropriate to consider the naturalization treaties and earlier legislation as a justification for the policy Congress has now adopted.

The treaties, as well as the 1907 Act, removed diplomatic protection from naturalized citizens who resided abroad for longer than certain periods of time in order to assure at least some recognition of American naturalization on the part of foreign countries.

The present act, however, does not have any purpose relating to the protection of naturalized citizens residing abroad. Indeed, as shown above, it has precisely a contrary purpose, that is, to strip the American

citizenship of naturalized citizens who reside abroad on the assumption that such citizens have for all intents and purposes abandoned the United States.

Of course, Congress may change its policy and adopt an opposite policy unless, as here claimed, the new policy is contrary to the Constitution. But the Government cannot rely on legislative history of a long-standing Government effort to assure protection to naturalized citizens residing abroad as a justification for a policy of denying protection and citizenship.

5. The Problem of Dual Nationality Can be No Basis for the Discrimination

The opinion of the District Court also notes that

> "... among the reasons Congress had for terminating the American nationality of naturalized citizens taking up residence abroad is that such termination will prevent them from transmitting American nationality to the foreign born children ...." (R. 52), 218 F. Supp. at 314

In the hearings leading to the enactment of this discriminatory provision embodied in Section 352 mention was made that this legislation was necessary so that naturalized citizens could not pass on American citizenship to their children who could remain American citizens without ever residing in the United States. As Mr. Flournoy, the Assistant Legal Advisor to the State Department, put it, Hearings Before the Committee on Immigration and Nationality, H.R. 6127 superseded by H.R. 9980, 76th Cong., 1st Sess., p. 137 (1940):

> "And then I think another very important element of this thing is the children. It is utterly absurd that these Italians should live in Italy or

Hungarians who live in Hungary who are breeding citizens of the United States, who have a right, whenever they see fit, to come over to this country."

The problem of dual nationality in children raised abroad is plainly not limited to the children of naturalized citizens. If appellant had been born in the United States instead of naturalized, her children would also be dual nationals.

Moreover, this is a problem which can and has been dealt with by limited legislation dealing specifically with this particular problem.

As the District Court itself notes in its opinion (R. 35), 218 F. Supp. at 305, appellant's children in order to retain their American citizenship must come to the United States prior to the age of twenty-three and live here for at least five continuous years. Section 1401(a)(7). Furthermore, Section 350 of the 1952 Act, 8 U.S.C. § 1482, spells out when certain dual nationals lose their citizenship by residence in the foreign state of which they are nationals.

If any problems relating to dual nationals are not covered by these provisions, Congress could assuredly deal, and would therefore be required to deal (see (I)(D)(2) above), with this problem by less drastic means than depriving most naturalized citizens, who, like appellant, are not dual nationals, of their citizenship on the basis of residence abroad.

II. CONGRESS HAD NO POWER TO ENACT SECTION 352 EVEN WITHOUT ITS DISCRIMINATORY PROVISION

We have pointed out that the arbitrary discrimination against naturalized citizens in Section 352 is a violation of the Fifth Amendment's requirement of due process of law. But even if the Section applied to all citizens equally, we submit it would have been beyond the powers of Congress, to enact. Congress, under its foreign affairs power, does not have the authority to attach the withdrawal of citizenship to an act such as mere residence abroad which is completely consistent with allegiance to this country.

Congress has no general power to deprive any person of citizenship. "The power of naturalization, vested in Congress by the Constitution is a power to confer citizenship, not a power to take it away . . . ." *United States* v. *Wong Kim Ark*, 169 U.S. 649, 703.

There is, of course, no question that citizenship may be voluntarily relinquished. The right of voluntary expatriation was recognized by Congress in 1868, Act of July 27, 1868, 15 Stat. 223.

It has also long been recognized that citizenship may not only be voluntarily renounced through exercise of the right of expatriation, but that Congress may provide that certain actions, in derogation of undivided allegiance to the United States, constitute a voluntary abandonment of American citizenship. *Savorgnan* v. *United States*, 338 U.S. 491.

But, as shown below, the decisions of this Court, particularly *Perez* v. *Brownell*, 356 U.S. 44, clearly suggests that Congress in the exercise of its general powers may not attach expatriation to acts which, such as mere

residence abroad, are completely consistent with American citizenship.

There are only three cases in which this Court has sustained the withdrawal of citizenship under a statute. *Mackenzie* v. *Hare*, 239 U.S. 299, *Savorgnan* v. *United States*, 338 U.S. 491 and *Perez* v. *Brownell*, *supra*. In *Mackenzie* and *Savorgnan* the expatriating act was one through which the citizenship of a foreign country was acquired. In *Perez* this Court held that Congress, pursuant to its foreign affairs power, could take away the citizenship of a person who voluntarily voted in a foreign political election. The majority of the Court upheld the constitutionality of the statute because it felt that voting in a foreign political election could reasonably be held to connote both a lack of allegiance to the United States and allegiance to a foreign country. The minority dissented on the ground that voting in a foreign political election was not an act from which Congress could reasonably imply abandonment of American citizenship. There can, we submit, be no such difference of opinion with respect to the act of residing abroad. It is plainly consistent with continued allegiance to the United States.

Perez was the first case in which this Court has held that Congress may attach expatriation to an act which does not constitute an express renunciation of American citizenship by the acquisition of citizenship in a foreign country. In both *Mackenzie* and in *Savorgnan*, as we have seen, the citizen who was held to have expatriated himself had acquired a foreign nationality by the very act which was the basis of the expatriation.

This Court, however, has never held, in *Perez* or any other decision that Congress may attach expatriation

to an act which may not reasonably be deemed to be in derogation of undivided allegiance to this country. As Mr. Justice Stewart stated in his dissenting opinion in *Mendoza-Martinez,* 372 U.S. at 214:

> "This Court has never held that Congress' power to expatriate may be used unsparingly in every area in which it has general power to act. Our previous decisions upholding involuntary denationalization all involved conduct inconsistent with undiluted allegiance to this country."

"And it cannot fairly be said that the present case is of that character." (Dissenting Opinion below of Judge Fahy, (R. 58, n.3); 218 F. Supp. at 317).

Mr. Justice Brennan in his concurring opinion in *Mendoza-Martinez* similarly stated, 372 U.S. at 187-188:

> ". . . the Court has never held that expatriation was to be found in Congress' arsenal of common sanction available for no higher purpose than to curb undesirable conduct . . . ."

On the contrary, as Mr. Justice Stewart noted in his dissenting opinion in *Mendoza-Martinez, Id.* at 241:

> "Previous decisions have suggested that Congressional exercise of the power to expatriate may be subject to a further constitutional restriction—a limitation upon the kind of activity which may be made the basis of denationalization."

Such a limitation on congressional power is clearly suggested in *Perez.*

This Court in *Perez* was careful to emphasize that the controlling elements in that decision were (1) the fact that voting in a foreign political election connoted a lack of allegiance to the United States and allegiance

to a foreign country, and (2) the fact that it involved the participation by a United States citizen in the political affairs of a foreign nation.

The *Perez* opinion states, 356 U.S. at 60-61,

> "... Moreover, the fact is not without significance that Congress has interpreted this conduct, not irrationally, as importing not only something less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship."

The Court, id. at 54 quotes from the report of the Cabinet Committee which recommended the legislation

> " 'Taking an active part in the political affairs of a foreign state by voting in a political election therein is believed to involve a political attachment and practical allegiance thereto which is inconsistent with continued allegiance to the United States, whether or not the person in question has or acquires the nationality of the foreign state. In any event it is not believed that an American national should be permitted to participate in the political affairs of a foreign state and at the same time retain his American nationality. The two facts would seem to be inconsistent with each other.'

Id. at 57, this Court also stated:

> "The legislators, counseled by those on whom they rightly relied for advice, were concerned about actions by citizens in foreign countries that create problems of protection and are inconsistent with American allegiance."

The opinion emphasizes that Congress, under its foreign affairs power, may apply the sanction of with-

drawal of citizenship to deal with difficulties of an acute nature which may arise "when the citizen of one country chooses to participate in the political or governmental affairs of another country." 356 U.S. at 59.

Accordingly, we think that *Perez* clearly means that Congress has a power to attach expatriation only to acts which are inconsistent with allegiance and through their political nature connote allegiance to a foreign country.

Judge Fahy in his dissenting opinion below expressed a similar view of this Court holding in *Perez*:

> ". . . The premise stated by Mr. Justice Frankfurter in *Perez*, supra, to sustain the loss of citizenship where the individual had voted in a foreign election, should not be read as holding that such power sweeps all before it. Voting has been traditionally considered one way a person indicates his political allegiance. And our earliest statute on denationalization had to do primarily with codifying the ways in which it could be objectively determined that a citizen had exercised his right voluntarily to expatriate himself. It does not follow that any governmental action connected in some way with foreign relations can be judicially approved notwithstanding the Bill of Rights." (R. 60), 218 F. Supp. at 319

The reasons for the limitations on the power to expatriate which this Court has defined in *Perez* are, we think, obvious and compelling.

Citizenship is not a right which may be freely sacrificed to governmental expediency. Once a person becomes a citizen, be it by birth or naturalization, that person is made an integral part of the body politic. The Government is committed to that citizen even if his

citizenship should become a matter of embarrassment or difficulty. In return the citizen owes allegiance to his country and is obligated to perform whatever duties of citizenship may properly be imposed on him no matter how difficult or embarrassing it may be to him. As this Court stated in *Luria* v. *United States*, 231 U.S. 9, 22:

> "Citizenship is a membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obligations, one being a compensation for the other. . . ."

So long as the citizen maintains allegiance he is entitled to his citizenship and also in most cases to have his country protect him, even if this should be troublesome to its officials. Appellant's residence in Germany is of course in no respect embarrassing to this country.

The District Court, apparently recognizing these limitations on the power to expatriate in order to sustain the statute, concluded that appellant's foreign residence is not consistent with American citizenship. The Court stated that:

> ". . . settlement by a naturalized citizen in the foreign country of his nativity and the centering there of all his primary interest, as the plaintiff has done, is conduct traditionally regarded by this government as evidence tending to show an intentional surrender of American citizenship or as an importing form of transfer of allegiance to the foreign country." (R. 53), 218 F. Supp. at 314-315.

We submit, however, that mere foreign residence is clearly a neutral action neither connoting allegiance nor the lack of it. Residence abroad plainly cannot,

as the act involved in *Perez*, be reasonably regarded as inconsistent with allegiance to the United States or as a political activity which demonstrates an allegiance to a foreign government.

Hundreds of thousands of Americans now have their residences in other countries, some for business reasons, some for reasons of health, or for a great variety of other personal reasons. They include both naturalized and native-born citizens. These persons are in many cases engaging in the same kinds of activities which they might pursue in this country.[17]

It is impossible to see how residence abroad, taken alone, can demonstrate a want of allegiance to this nation, particularly in an era of vastly expanding foreign commerce, investment and travel. Congress itself has demonstrated that it does not regard mere residence as a sign of lack of allegiance, for it has not seen fit to expatriate native-born citizens even if they spend their entire lives in foreign countries.

The facts of this case demonstrate that appellant's residence abroad has no relation to her allegiance to the United States. The appellant's residence in Germany is solely the result of the fact that Germany is her husband's home and the place where he practices his profession. Plainly residence with her husband has no connotation of political allegiance to his country.

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[17] State Department figures show that there are at present some 699,000 Americans, excluding military personnel, who reside in foreign countries throughout much of the world. Although there are no statistics available as to how many of these are naturalized, it is to some extent indicative that of the some 918,000 United States passports issued during the year 1963, some 137,000 were issued to naturalized citizens.

Nor does mere residence abroad require political activity. Residence abroad does not involve participation in the political or governmental affairs of another country.

Mr. Justice Brennan in his concurring opinion in *Mendoza-Martinez* points out that flight from the country to escape the draft can be an equivocal action not inconsistent with allegiance to the United States, as it may be the result of "the unshakeable fear of physical stress or harm, the intellectual or moral aversion to combat, or mental aberration." (372 U.S. at 190)

A fortiori the residence abroad of appellant who lives in Germany to be with her husband, and the residence abroad of many citizens who live in foreign countries for personal, family or business reasons, is clearly consistent with allegiance to this country, and may not serve as a basis for expatriation.

The District Court, in its opinion, stated that there is nothing in the record which would indicate that appellant, since leaving this country, "has performed any of the duties of American citizenship or that she ever intends to resume them." (R. 53), 218 F. Supp. at 315. The court, however, does not point to any duty of citizenship which requires residence at home nor, of course, to any failure on the part of appellant to perform any specific duty while residing abroad.

III. SECTION 352 IMPOSES A PENALTY WITHOUT THE SAFEGUARDS GUARANTEED BY THE FIFTH AND SIXTH AMENDMENTS.

This Court has held in *Trop* v. *Dulles*, 356 U.S. 86, and *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, that expatriation imposed under other provisions of the same Act constitutes a penalty.

In *Mendoza-Martinez*, this Court held the imposition of expatriation as a penalty *automatically* upon the performance of the proscribed conduct, is unconstitutional because of the lack of trial by jury and the other safeguards guaranteed by the Fifth and Sixth Amendments.

It is our position that Section 352 which automatically attaches loss of citizenship to residence abroad, also imposes this sanction as a penalty. As in *Mendoza-Martinez* none of the safeguards guaranteed by the Fifth and Sixth Amendments are provided.

Under Section 352 a naturalized citizen who resides abroad for the stated periods of time stands convicted of disloyalty to his adopted country, and is punished for this act by the forfeiture of his citizenship. Congress, as we have seen under I(D)(1), enacted this legislation on the assumption that naturalized citizens are citizens who have, for all intents and purposes, abandoned their allegiance to the United States. The statute, as shown in more detail below, creates a conclusive presumption that the naturalized citizen who resides abroad is disloyal to this country. Stated in a slightly different way, Congress considered it a disloyal act for a person to acquire citizenship by naturalization and then to take up residence in another country.

In *Mendoza-Martinez*, 372 U.S. at 168-169, this Court outlined the factors to be considered in determining whether a statute imposing a sanction is penal or regulatory. Under these standards we think it is clear that Section 352 imposes the sanction of expatriation as a penalty and is not, as the District Court held, a regulatory statute which Congress has passed under its foreign affairs power.

The sanction—loss of citizenship—clearly "involves an affirmative disability or restraint * * * which has been historically regarded as punishment." *Id.* at 168. As this Court pointed out in *Mendoza-Martinez*, 372 U.S. at 168, n. 23 "forfeiture of citizenship and the related devices of punishment and exile have throughout history been used as punishment."

The operation of Section 352 plainly "will promote the traditional aims of punishment—retribution and deterrence." *Id.* at 168. The manifest purpose and effect of Section 352 is to deter and prevent naturalized citizens from living abroad for longer than stated periods of time regardless of their allegiance to this country and regardless of whether the residence abroad may be embarrassing this country's foreign relations. Those naturalized citizens who do violate this obligation are punished by enforced forfeiture of their citizenship.

There is, as we have already seen, "no alternative purpose" which may rationally be assigned to this sanction and in any event "it appears excessive in relation to the alternative purpose assigned." *Id.* at 168-169. The alternative purpose which has been assigned to this statute is the regulation of foreign affairs. As we have shown under point I(D), this statute, which imposes this sanction only on naturalized citizens, is not rationally justified as a proper exercise of the foreign affairs power. Even if the residence abroad of naturalized citizens does cause some embarrassment to this country such embarrassment is, as Judge Fahy pointed out in his dissenting opinion not shown to be "certain or substantial" (R. 66), 218 F. Supp. at 322. Accordingly, the sanction imposed, loss of citizenship, which has been held by

this Court to be cruel and unusual punishment, *Trop* v. *Dulles, supra,* is clearly "excessive in relation to the alternative purpose assigned"—here, the avoidance of possible embarrassment in the conduct of foreign affairs.

In *Mendoza-Martinez* this Court also said that another factor to be considered in determining whether a statute was penal or regulatory, is whether "it comes into play only on a finding of scienter." *Id.* at 168. While Section 352 does not expressly require *scienter,* the reason that it does not is because Congress has already assumed *scienter* on the part of naturalized citizens who took up evidence outside the United States for stated periods of time.

Section 352 is premised upon a conclusive presumption that naturalized citizens who reside abroad have abandoned their allegiance to the United States. This is evident from the history of the Section. The Act of March 2, 1907, 34 Stat. 1238 (See note 9) created a presumption that a naturalized citizen who resided abroad for a stated period of time had abandoned citizenship. This presumption, however, could be "overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States . . ." The purpose and effect of Section 352 was to make this presumption conclusive. As the legislative history clearly shows, this presumption was made conclusive to avoid the administrative problems raised by the necessity of making a case-by-case determination under the earlier act. See I(D)(1) above. As Judge Fahy noted in his dissenting opinion, (R. 59 n. 4) 218 F. Supp. at 318, "what was sought to be avoided was the necessity to decide—either administratively or judicially—whether an individual had abandoned his

American citizenship by continued residence in the land of his birth or prior nationality." [18]

Accordingly, we submit under the standards set forth in *Mendoza-Martinez* the expatriation imposed by Section 352 is clearly penal in character.

We think that the penal nature of Section 352 is further highlighted by the exceptions to its operation in Sections 353 and 354. These Sections exempt from the penalties of Section 352 persons who have, for example, served in the Armed Forces in time of war, or incurred a disability in the service of the United States. These exceptions completely negate the assertion that Section 352 is a regulation of foreign affairs. For these exemptions are nothing more than a mitigation of punishment for certain kinds of good behaviour—behaviour totally unrelated to foreign affairs. In these exceptions Congress is rewarding naturalized citizens for certain services or actions with respect to this country. Rewards are the counterpart of punishment. They go together, and the system of rewards and punishment set up by Section 353 and 354 is unmistakably directed to individual conduct and not to the regulation of foreign affairs.

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[18] Another relevant factor mentioned by this Court in *Mendoza* is whether "the behaviour to which it applies is already a crime." *Id.* at 168. Residence abroad on the part of naturalized citizens has, of course, not been made a crime under any other statute, although of course, other acts of disloyalty have. In any event, this, however, is by no means a prerequisite for holding the provision to be penal. See, *Helwig* v. *U. S.*, 188 U.S. 605 and *United States* v. *Lovett*, 328 U.S. 303. As this court said, in *Mendoza-Martinez* the "criteria which must be considered in determining whether a statute is penal may often point in differing directions." 322 U.S. at 169. Here all but one of the relevant factors points strongly in one direction.

The conclusion that expatriation here is imposed as a penalty is in no way inconsistent with the decisions in which this Court has upheld expatriation as constitutional. *Mackenzie* v. *Hare, supra,* 239 U.S. 299; *Savorgnan* v. *U. S., supra,* 338 U.S. 491, and *Perez* v. *Brownell,* 356 U.S. 44.

As we have seen under III in these cases the Court upheld expatriation where Congress had made expatriation a consequence of conduct in derogation of undivided allegiance to the United States. In those cases the statute was held to be a reasonable exercise of Congress' foreign affairs powers because Congress, under its foreign affairs power may act with respect to the acquisition by an American citizen of foreign nationality, or the performance by him of political actions such as voting in foreign elections, which involve some degree of adherence to the Government of another country.

In those cases, therefore, there was an "alternative purpose" to which the withdrawal of citizenship could rationally be connected, *Mendoza-Martinez,* 372 U.S. 168-169. Such an "alternative purpose" sufficient to sustain this legislation as an exercise of the foreign affairs power is lacking here.

Accordingly, expatriation here is imposed as a penalty, and under *Mendoza* Section 352 is unconstitutional because the penalty is imposed automatically without the safeguards guaranteed by the Fifth and Sixth Amendments.

IV. SECTION 352 FAILS TO MEET THE DUE PROCESS REQUIREMENTS OF THE FIFTH AMENDMENT EVEN ASSUMING THAT IT IS NOT PENAL IN NATURE.

Even assuming *arguendo* that Section 352 is a regulatory rather than a penal statute, it violates the due process guaranteed by the Fifth Amendment.

Citizenship is, of course, a basic right which may not be denied without due process of law. In *Mendoza-Martinez,* this Court held that the imposition of expatriation as a penalty without the usual procedural safeguards guaranteed by the Fifth and Sixth Amendments violate the Constitution. The same harsh and drastic sanction of expatriation, even if not as a penalty, may not be imposed arbitrarily without the due process required by the Fifth Amendment. See *Perez* v. *Brownell,* 356 U.S. at 58 and *Nishikawa* v. *Dulles,* 386 U.S. 129. Lesser rights included in the right of citizenship such as the "right to travel" have also been held to be "a part of the 'liberty' " of which the citizen cannot be deprived without due process of law under the Fifth Amendment. *Kent* v. *Dulles,* 357 U.S. 116, 125.

Section 352 is, as we have seen under III above, based in its entirety on a conclusive presumption that naturalized citizens have abandoned their allegiance to the United States. This conclusive presumption was adopted as a matter of administrative convenience to avoid the necessity to determine allegiance of naturalized citizens residing abroad on an individual basis.

This conclusive presumption on which Section 352 is based is clearly arbitrary and does not meet the standards required by the Fifth Amendment.

In *Mendoza-Martinez,* Mr. Justice Stewart together with Justice White joined in the result reached by the

majority (with respect to *Cort*) precisely on the ground that the statute there involved a presumption violative of due process. The presumption involved there was that a person who leaves the United States and, after leaving, fails to comply with the draft laws, will be presumed to have departed "for the purpose of evading the draft." Mr. Justice Stewart, relying on *Tot* v. *United States,* 319 U.S. 463, 467, stated in his opinion that this statutory presumption was "constitutionally invalid because there is insufficient 'rational connection between the fact proved and the ultimate fact presumed.'" 372 U.S. at 217. Mr. Justice Stewart went on to say:

> "A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. *Manley* v. *Georgia,* 279 U.S. 1, 6. A federal statute which creates such a presumption is no less violative of Fifth Amendment due process. 'Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property.'" *Ibid.*

See also *Bailey* v. *Alabama,* 219 U.S. 219.

It is clear that the presumption on which this entire statute is based must fail for the same reasons. The presumption that a naturalized citizen who resides abroad has abandoned his allegiance to the United States is clearly arbitrary as there is no necessary connection between residence and allegiance and the naturalized citizen is denied any opportunity to rebut this presumption.

The extent to which this presumption deprives the naturalized citizen of his rights of due process are indicated by the fact that if Congress had made the

fact presumed—the abandonment of allegiance—the expatriating act the burden would have been on the Government to prove that act "by clear, convincing and unequivocal evidence." *Nishikawa* v. *Dulles*, 356 U.S. 129, 133.

The effect of the statute in denying procedural due process is emphasized by the language of the District Court opinion. From that opinion, it is clear that the majority District Judges, as well as the Congress, have convicted appellant of disloyalty and of the dereliction of her duties as a citizen without a trial. They have disregarded the fact that, under the statute, appellant was neither given specific charges of disloyalty nor was she given an opportunity to meet such charges. Thus, the court below stated as follows (R. 53), 218 F. Supp. at 315:

> "Finally, the plaintiff insists that she is an American by training, in thought and in feeling, and that she values highly her American citizenship. But these sentiments, however, sincere, were not conducive to her retention of residence in the United States. *Nor is there anything in the record to show that since leaving this country she has performed any of the duties of American citizenship or that she ever intends to return to assume them.* By voluntarily going to the foreign country of her birth and there continuously residing for three years, she has brought on her expatriation." (Emphasis supplied)

Of course, there is nothing in the record which shows in the slightest that appellant has failed to perform any duty imposed upon her as a citizen. The court does not specify what duties of American citizenship it assumes appellant has neglected to perform or why she must "return" to "assume" them.

We assert that contrary to the allegations of the court below, Mrs. Schneider has and will continue to perform *all* of her responsibilities as an American citizen and that this is the meaning of her declarations of loyalty in the record (R. 7, 9). But if the Government intends to assert that this is not the case, and to charge Mrs. Schneider with derelictions in her responsibilities as a citizen, it would of course be the obligation of the Congress to lay down standards of dereliction of duty, to require specific charges to be made, and to give appellant an opportunity to defend herself against the charges.

For, leaving aside the fact that certain derelictions in duties as a citizen are not grounds for denationalization (see *Trop* v. *Dulles*, 356 U.S. 86), and assuming that the supposed derelictions in her duties would be a ground for denationalization, she should at least be adivsed of what those supposed derelictions are and provided a forum for defending herself against the allegations of such dereliction.

But the statute lays down no standards and gives no opportunity for defense. Instead, it creates a conclusive presumption of disloyalty and gives no opportunity for a due process procedure for determining the question.

It accordingly is plain violation of the procedural due process requirements of the Fifth Amendment.

V. SECTION 352 IS REPUGNANT TO THE EIGHTH AMENDMENT.

As we have seen under III above, section 352 is clearly penal in nature. In *Trop* v. *Dulles*, 356 U.S. 86 this Court held that expatriation imposed as a penalty for desertion in time of war constitutes a cruel and unusual punishment in violation of the Eighth Amend-

ment. We submit that *a fortiori* expatriation imposed as a penalty for residence abroad also represents a cruel and unusual punishment.

Mr. Chief Justice Warren in his opinion in *Trop* stated in strong language that expatriation as a punishment is barred by the Eighth Amendment.

> There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights, and presumably as long as he remained in this country he would enjoy the limited rights of an alien, no country need do so because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. In short, the expatriate has lost the right to have rights.
>
> "This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. * * * It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious." 356 at 101-102.

The expatriation as applied to a naturalized citizen under Section 352 has the same harsh consequences. Appellant, for example, by the deprivation of her American nationality has been left a stateless person

and lives in Germany at the mere sufferance of that country. Even though Germany has been generous in permitting her to remain there, she is subject to the threat that this may not always be the case.

The District Court in its opinion has pointed out that appellant at the present time could acquire German nationality. This is no answer to the cruel and unusual nature of the punishment imposed. (R. 35), 218 F. Supp. at 304. Mrs. Schneider does not want to acquire German nationality as she has no allegiance to Germany. German citizenship could in no event be a substitute for her rights of American citizenship.

CONCLUSION

Appellant is entitled to a declaratory judgment stating that she continues to be a citizen of the United States.

Respectfully submitted,

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APPENDIX

Additional Relevant Statutes

The following is the text of Sections 353, 354, 356 and 349 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U.S.C. § 1101:

SECTION 352 NOT EFFECTIVE AS TO CERTAIN PERSONS

SEC. 353. Section 352(a) shall have no application to a national who—

(1) has his residence abroad in the employment of the Government of the United States; or

"(2) is receiving compensation from the Government of the United States and has his residence abroad on account of disability incurred in its service; or

(3) shall have had his residence in the United States for not less than twenty-five years subsequent to his naturalization and shall have attained the age of sixty years when the foreign residence is established; or

(4) . . . has gone or goes abroad, and temporarily has his residence abroad, solely or principally to represent a bona fide American educational, scientific, philanthropic, commercial, financial, or business organization, having its principal office or place of business in the United States, or a bona fide religious organization having an office and representative in the United States, or an international agency of an official character in which the United States participates, for which he receives a substantial compensation; or

(5) has his residence abroad and is prevented from returning to the United States exclusively

(a) by his own ill health; or (b) by the ill health of his parent, spouse, or child who cannot be brought to the United States, whose condition requires his personal care and attendance . . . ."

(6) has his residence abroad for the purpose of pursuing a full course of study of a specialized character or attending full-time an institution of learning of a grade above that of a preparatory school: *Provided,* That such residence does not exceed five years; or

(7) is a spouse or child of, or has a son or daughter who is, an American citizen, and who has his residence abroad for the purpose of being with his American citizen spouse, parent, or son or daughter who has his residence abroad for one of the objects or considerations specified in paragraphs (1)—(5) or (6) of this section, or paragraph (2) of section 354 of this title; or

(8) is the spouse or child of an American national by birth who while under the age of twenty-one years had his residence in the United States for a period or periods totaling ten years, and has his residence abroad for the purpose of being with said spouse or parent; or

(9) was born in the United States or one of its outlying possessions, who originally had American nationality and who, after having lost such nationality through marriage to an alien, reacquired it; or

(10) has, by Act of Congress or by treaty, United States nationality solely by reason of former nationality and birth or residence in an area outside the continental United States: *Pro-*

vided, That subsections (b) and (c) of section 404 of the Nationality Act of 1940, as amended (8 U.S.C. 804(b) and (c)), shall not be held to be or to have been applicable to persons defined in this paragraph.

SECTION 352 (A) (2) NOT APPLICABLE AS TO CERTAIN PERSONS

SEC. 354. Section 352(a)(2) of this title shall have no application to a national—

(1) who is a veteran of the Spanish-American War, World War I, or World War II, or of the Korean hostilities (having served honorably in an active-duty status in the military, air, or naval forces of the United States during a period beginning June 25, 1950, and ending July 1, 1955), and the spouse, children, and dependent parents of such veteran whether such residence in the territory of a foreign state or states commenced before or after the effective date of this chapter: *Provided,* That any such veteran who upon June 27, 1952, has had his residence continuously in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated for three years or more, and who has retained his United States nationality solely by reason of the provsions of section 406(h) of the Nationality Act of 1940, shall not be subject to the provisions or requirements of section 352(a)(1) of this title: *Provided further,* That the provisions of section 404(c) of the Nationality Act of 1940, as amended, shall not be held to be or to have been applicable to veterans of World War II;

(2) who has established to the satisfaction of the Secretary of State, as evidenced by possession of a valid unexpired United States passport or other valid document issued by the Secretary of State, that his residence is temporarily outside of the United States for the purpose of (A) carrying on a commercial enterprise which in the opinion of the Secretary of State will directly and substantially benefit American trade or commerce; or (B) carrying on scientific research on behalf of an institution accredited by the Secretary of State and engaged in research which in the opinion of the Secretary of State is directly and substantially beneficial to the interests of the United States; or (C) engaging in such work or activities, under such unique or unusual circumstances, as may be determined by the Secretary of State to be directly and substantially beneficial to the interests of the United States;

(3) who is the widow or widower of a citizen of the United States and who has attained the age of sixty years, and who has had a residence outside of the United States and its outlying possession for a period of not less than ten years during all of which period a marriage relationship has existed with a spouse who has had a residence outside of the United States and its outlying possessions in an occupation or capacity of the type designated in paragraphs (1), (2), (3), (4), or (5) (A) of section 353, or paragraphs (1), (2), or (4) of this section;

(4) who has attained the age of sixty years, and has had a residence outside of the United States and its outlying possessions for not less than ten

years, during all of which period he has been engaged in an occupation of the type designated in paragraphs (1), (2), or (4) of section 353, or paragraph (2) of this section, and who is in bona fide retirement from such occupation; or

(5) who shall have had his residence in the United States for not less than fifteen years subsequent to his naturalization and prior to the establishment of his foreign residence; or who prior to attaining the age of twenty-one years, shall have had his residence in the United States for not less than fifteen years subsequent to his lawful admission for permanent residence.

NATIONALITY LOST SOLELY FROM PERFORMANCE OF ACTS OR FULFILLMENT OF CONDITIONS

SEC. 356. The loss of nationality under this chapter shall result solely from the performance by a national of the acts or fulfillment of the conditions specified in this chapter.